CHONG KUENG YING & ORS. v. LOVIS LAVAGNA

[F.C. (Azmi L.P., Suffian and H.S. Ong F.JJ.) February 21, 1972]

[Kuala Lumpur — Federal Court Civil Application No. 3 of 1971]

Practice and Procedure — Appeal — Application for leave to appeal out of time — Whether mistake of legal adviser sufficient ground for granting leave — Federal Court (Civil Appeal) (Transitional) Rules, 1963, r. 13.

This was an application for leave to appeal out of time. Although the applicants filed their notice of appeal within time, they failed to serve a copy of it on the respondent within time. The ground on which special leave was asked was that the appeallants' legal adviser had made a mistake.

Held: the mistake of a legal adviser is not sufficient ground for granting leave.

Cases referred to:-

(1) *Gatti* v. *Shoosmith* [1939] 3 All E.R. 916.

(2) *Abdul Majeed* v. *Yeo Chng Tay* [1964] M.L.J. 75.

The following cases were also cited in argument: *Gurbachan Singh* v. *Seagroatt & Campbell (No. 2)* [1962] M.L.J. 370; *Tan Ting Kok* v. *Cheong Lep Keen & Anor.* [1969] 1 M.L.J. 153; *Ramanath & Ors.* v. *Ban Tsan Chuan* [1967] 2 M.L.J. 284; *Ratnam* v. *Cumarasamy & Anor.* [1965] 2 M.L.J. 228; *John Puddicombe Wilkins & 2 Ors.* v. *John Patrick Kenelm Wilkins & Anor.* [1951] M.L.J. 80; *Re Macadam (No. 2)* [1950] 1 All E.R. 659.

FEDERAL COURT.

David Tay for the applicants.

K. A. Menon for the respondent.

Suffian F.J. (delivering judgment of the court): This is an application for leave to appeal out of time.

The applicants filed their notice of appeal within time, but failed to serve a copy of it on the respondent within time.

The matter is governed by rule 13 of the Federal Court (Civil Appeals) (Transitional) Rules which requires the special leave of the Federal Court. It reads:

"No appeal shall, except by special leave of the full court, be brought after the expiration of one month...."

The ground on which special leave is asked is that the applicants' legal adviser has made a mistake. He was under the erroneous impression that under rule 7 it was not for him but for the court to serve the notice of appeal on the respondent. When he realised that it was for him to serve it, he was out of time.

In England the mistake of a legal adviser does not preclude a Court of Appeal from granting leave. That is the law since the amendment of the English R.S.C. in 1909. Before 1909 the English Court of Appeal had no discretion to grant leave if the appellant was out of time owing to a mistake of his legal adviser. See *Gatti v. Shoosmith.*[1]

The law here, however, is the same as the pre-1909 English law: the mistake of a legal adviser is not a sufficient ground for granting leave, see *Abdul Majeed* v. *Yeo Chng Tay.*[2]

We would therefore refuse this application with costs.

Application refused.

Solicitors: *Murphy & Dunbar; K. A. Menon & Co.*

KOON HOI CHOW v. PRETAM SINGH

[O.C.J. (Sharma J.) February 29, 1972]

[Ipoh — Originating Motion No. 38 of 1971]

Specific Relief — Allegation of professional negligence — Whether applicant had legal right to have act performed — Essential prerequisites — Specific Relief Ordinance, 1950, s. 44.

Administrative Law — Mandamus — Whether lies to enforce civil liability arising out of breach of contract.

This was an application under section 44 of the Specific Relief Ordinance, 1950, for an order of *mandamus.*

An infant met with an accident on August 19, 1970, and as a result of that accident his leg was amputated above the knee. He brought an action for damages against the defendant (Civil Suit No. 168 of 1971). The present application was filed by the defendant, in the said suit, against the respondent, the surgeon who performed the operation on the infant. The applicant alleged that the amputation of the leg was not necessary, the inference being that it was the negligence of the respondent which aggravated the injuries. On being requested by the applicant's solicitor for details of the injuries found on the infant and the treatment given at the hospital, the infant's solicitors authorized the hospital authorities to supply the information. This request was not complied with.

Thus, the applicant, not having received any satisfaction from the hospital authorities, made an application under section 44 of the Specific Relief Ordinance, 1950.

The issue before the court was whether the applicant had succeeded in bringing his case within the purview of section 44 of the Specific Relief Ordinance.

Held: the applicant must show not only that he had a legal right to have the act performed, but that the right was so clear and well defined as to be free from any reasonable controversy. In the circumstances of this case, the applicant had failed to show the existence of any legal right to compel the performance of a legal duty cast upon the respondent.

Per Sharma J.: "...any duty or obligation falling upon a public servant out of a contract entered into by him as such public servant, cannot be enforced by machinery of a writ of *mandamus* or an order under section 44 of the Specific Relief Ordinance. *Mandamus* does not lie to enforce a civil liability arising out of a breach of contract to enforce rights based on contract. A civil suit for damages or for the enforcement of the civil liability may be the only proper remedy in such a case. Similarly, *mandamus* does not issue to enforce a civil liability arising under torts".

ORIGINATING MOTION.

Lal Harcharan Singh for the applicant.

Abdul Razak (Senior Federal Counsel) for the respondent.

Sharma J. (delivering oral judgment): One Adthinarayanan, an infant, met with an accident on 19th August, 1970, and as a result of that accident his leg was amputated above the knee. He filed an action for damages against Koon Hoi Chow who was the driver of the van which is said to have knocked into the said infant. The claim of the infant is the subject